

# **Exhibit 1**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF WATER

**Memorandum on Endangered Species Act Section 7(a)(2) Consultation for State and Tribal  
Clean Water Act Section 404 Program Approvals**

Pursuant to Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344, the U.S. Army Corps of Engineers (Corps) is authorized to permit the discharge of dredged or fill material into “waters of the United States.” States and federally recognized tribes may assume authority to implement the CWA Section 404 permitting program within their respective jurisdictions from the Corps by submitting a request to the U.S. Environmental Protection Agency (EPA or Agency), as Congress authorized the EPA Administrator to approve program transfers from the Corps to the states and tribes. In the past, EPA has taken the position that such program transfer decisions do not involve an exercise of discretion warranting consultation under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536, meaning EPA would not need to consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereafter referred to as “the Services”) when acting on an assumption application from a state or tribe. EPA has reconsidered its prior position, articulated in 2010, that the decision to approve a state or tribal CWA Section 404 program does not trigger ESA Section 7 consultation. Going forward, EPA has determined that it should consult with the Services under Section 7 of the ESA if a decision to approve a state or tribal CWA Section 404 program may affect ESA-listed species or designated critical habitat.

**I. Background**

To assume the CWA Section 404 permitting program, states and tribes must develop permit programs for discharges of dredged or fill material consistent with the requirements of the CWA and implementing regulations at 40 C.F.R. part 233 and submit a request to assume any such program to EPA. States and tribes must administer and implement programs that are consistent with and no less stringent than the requirements of the CWA and implementing regulations. 40 C.F.R. 233.1(d). The Administrator “shall approve” an assumption request if the state or tribal program satisfies the requirements of the CWA Section 404(h)(1). 33 U.S.C. 1344(h)(2)(A). If the Administrator fails to make a determination within 120 days of receiving the request, the program shall be deemed approved. 33 U.S.C. 1344(h)(3).

Section 7 of the ESA directs each federal agency to ensure, in consultation with one or both of the Services, as appropriate, that “any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence” of listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). ESA Section 7 consultation is not required if the agency determines that an action will not affect listed species or designated critical habitat. ESA Section 7 applies to “all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. 402.03.

In December 2010, EPA articulated its position that ESA Section 7 consultation is not applicable to CWA Section 404 program transfer decisions. EPA stated at that time that a 2007 U.S. Supreme Court decision from another context, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("*NAHB*"), controlled the inquiry. In *NAHB*, the Supreme Court held that because the transfer of CWA National Pollutant Discharge Elimination System (NPDES) permitting authority to a state "is not discretionary, but rather is mandated once a State has met the criteria set forth in Section 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger Section 7(a)(2)'s consultation and no-jeopardy requirements." 551 U.S. at 673. The Supreme Court held that "[w]hile EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out Section 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add an entirely separate prerequisite to the list. Nothing in the text of Section 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." *Id.* at 671.

EPA evaluated this decision in response to a December 6, 2010 letter sent to the Agency by the Environmental Council of the States (ECOS) and the Association of State Wetland Managers (ASWM) asking whether EPA must conduct an ESA Section 7 consultation prior to approving or disapproving a Section 404 program request. The Agency responded to ECOS and ASWM in a December 27, 2010 letter ("2010 Letter"), see Docket ID No. EPA-HQ-OW-2020-0008, stating that, as in the CWA Section 402(b) context, when considering a CWA Section 404 program transfer request, EPA is only permitted to evaluate the specified criteria in CWA Section 404(h) and does not have discretion to add requirements to the list in CWA Section 404(h), including considerations of potential impacts to endangered and threatened species through ESA Section 7 consultation with the Services.

EPA stated in the 2010 Letter that although there are some differences between CWA Sections 402 and 404, the Supreme Court's reasoning in *NAHB* applies to EPA's approval of a CWA Section 404(g) permitting program. Section 404(h)(2) of the CWA states that if the Administrator determines that a state program submitted under CWA Section 404(g)(1) has the authority set forth in CWA Section 404(h)(1), then the Administrator "shall approve" the state's application to transfer the CWA Section 404 permitting program. The 2010 Letter acknowledged that "there are some differences between § 402(b) and § 404(h)," but concluded that those differences did not render EPA's action approving a state CWA Section 404 program a "discretionary federal action." The letter did not address the specific differences between the approval requirements of the CWA Section 402 and 404 programs that EPA now recognizes are relevant to the applicability of ESA Section 7. The 2010 Letter concluded that EPA's decision as to whether to approve a state CWA Section 404 program action is non-discretionary and ESA consultation is not required.

In July 2019, EPA received a request from the Florida Department of Environmental Protection (FDEP) asking EPA to engage in an ESA Section 7 consultation with the Services in connection with EPA's initial review of Florida's request to assume the CWA Section 404 program. FDEP provided a white paper asserting that ESA Section 7 consultation is required in the CWA Section 404 assumption context based on the unique statutory text of CWA Section 404 and its associated legislative history, which, in FDEP's view, differs in critical respects from other state delegation programs administered by EPA to which ESA Section 7 does not apply. FDEP stated that EPA's position was articulated in a two-page letter a few weeks after receiving the ECOS and ASWM letter and failed to acknowledge the critical distinctions between the statutory text of CWA Section 404 and the Section 402 program at issue in *NAHB*. FDEP also questioned the 2010 Letter's reliance on the legislative history of CWA Section 404

to support the non-discretionary nature of a state assumption decision, arguing that the legislative history supports the opposite conclusion.

The white paper explained that when a state or tribe administers the CWA Section 404 program, permittees must avoid adverse impacts to listed species or otherwise seek an incidental take permit under ESA Section 10, which involves a burdensome process for both permit applicants and government agencies. The white paper characterized the lack of incidental take coverage in state- or tribe-assumed programs as a significant hurdle to establishing an effective and efficient CWA Section 404 program in Florida and estimated that approximately ten percent of CWA Section 404 permits issued in Florida require some form of incidental take coverage.

The white paper viewed a one-time ESA Section 7 programmatic consultation in connection with EPA's initial review of an assumption application as an efficient and legally-defensible approach to resolving the lack of incidental take coverage for permittees and permitting agencies. An ESA Section 7 consultation on EPA's potential approval of Florida's program would allow the Services to issue a programmatic biological opinion and a programmatic incidental take statement, which could identify procedural requirements for state permitting under CWA Section 404 needed to support the Services' determination that assumption would not result in jeopardy to any listed species. Subject to the Services' incidental take statement and provided these requirements are followed, FDEP stated that this process would bring state CWA Section 404 permits within the ESA Section 7(o)(2) exemption from take liability.

## **II. Public Comment**

On May 21, 2020, EPA initiated a 45-day public comment period through an announcement in the Federal Register titled "Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program Is Nondiscretionary for Purposes of Endangered Species Act Section 7 Consultation" (Docket ID No. EPA-HQ-OW-2020-0008). EPA sought public comment regarding whether to reconsider its position that it lacks discretionary involvement or control within the meaning of 50 C.F.R. 402.03 when acting on a state or tribal application to administer the CWA Section 404 program sufficient to trigger ESA Section 7 consultation requirements. EPA identified the positions articulated in the FDEP white paper, as well as other considerations that may be relevant to this issue, and requested comment on whether EPA can and should engage in an ESA Section 7 consultation with the Services in connection with EPA's initial review of a state or tribal request to assume the CWA Section 404 program. The public comment period closed on July 6, 2020, and EPA received comments from a variety of stakeholders.

Several commenters stated that EPA's decision regarding a request to assume the CWA Section 404 permit program involves an exercise of discretion warranting consultation under ESA Section 7. These commenters recommended that EPA engage in a single ESA Section 7 programmatic consultation with the Services in connection with EPA's initial review of an assumption application. The commenters said that this process would enable the Services to issue a programmatic biological opinion and a programmatic incidental take statement, which could identify procedural requirements for state and tribal CWA Section 404 permits. They indicated that this approach could support a determination on the part of the Services that assumption would not result in jeopardy to any listed species and would ensure that activities authorized under state- or tribal CWA Section 404 permits would not be liable for incidental take as long as the terms and conditions of permitting are met.

Other commenters agreed that EPA's approval of a state or tribal CWA Section 404 permitting program is discretionary and thus triggers the requirements for consultation under Section 7 of the ESA. However, the commenters expressed concern about how states or tribes would ensure that the ESA's requirements are being applied at the project-specific level. These commenters said that EPA's consultation regarding whether to approve or disapprove an assumption request does not alleviate ESA liability concerns related to actions authorized by future state or tribal CWA Section 404 permits.

Certain commenters asserted that the Supreme Court's decision in *NAHB* applies to EPA's approval of CWA Section 404 programs, in addition to its approval of CWA Section 402 programs, and therefore EPA lacks discretion to consult under ESA Section 7 in approving state or tribal requests to assume permitting authority under CWA Section 404. These commenters argued that EPA's role under both the CWA Section 402 and 404 programs is limited to determining whether states and tribes have the legal authority Congress has specified; if the criteria are satisfied, EPA lacks the discretion to deny an application. The commenters also expressed concern that, as a practical matter, the agencies will spend significant time and resources collecting data and conducting analyses for a consultation but may not ultimately provide states and private landowners with incidental take protection under the ESA.

### **III. ESA Section 7 Applies to CWA Section 404 Program Assumption Decisions**

Following the release of the May 2020 Federal Register Notice and its review of public comments, EPA has reconsidered the position articulated in the 2010 Letter to ECOS and ASWM. EPA concludes that the Agency's decision as to whether to approve a state or tribal request to assume the CWA Section 404 permit program involves an exercise of discretion warranting consultation under ESA Section 7 if EPA determines that such an approval action may affect a listed species or designated critical habitat. EPA's current view is that the *NAHB* decision, while informative, does not control in the CWA Section 404 program assumption context because Congress established a framework in which ESA concerns could be addressed when delegating authority to the Agency to transfer permitting responsibility from the Corps to individual states and tribes. That ability is absent in the list of factors Congress instructed EPA to consider when authorizing states to take on NPDES permitting authority.

For example, CWA Section 404(h)(1)(A) requires the Administrator to determine whether a state or tribe seeking CWA Section 404 program assumption has the authority to issue permits which apply and assure compliance with the CWA Section 404(b)(1) Guidelines. Those Guidelines include a provision that prohibits the permitting of a discharge if it jeopardizes the continued existence of endangered or threatened species or results in the likelihood of the destruction or adverse modification of designated critical habitat. 40 C.F.R. 230.10(b)(3). EPA's regulations state that in determining compliance with the CWA Section 404(b)(1) Guidelines, where ESA Section 7 consultation occurs, the Services' conclusions "concerning the impact of the discharge on threatened and endangered species and habitat shall be considered final." 40 C.F.R. 230.30(c). The CWA Section 404(b)(1) Guidelines were first promulgated in 1975, including the current prohibition on issuing permits jeopardizing threatened or endangered species, *before* Congress enacted CWA Section 404(g). 40 Fed. Reg. 41,292, 41,296 (Sept. 5, 1975). Thus, Congress was aware when requiring state or tribal program compliance with the CWA Section 404(b)(1) Guidelines that the no jeopardy mandate would apply to all permits issued by states and tribes.

Unlike the statutory construct governing EPA's delegation of NPDES program authority under CWA Section 402, EPA is required to seek and consider comments from the Services when deciding whether to approve a state or tribal request to assume the CWA Section 404 permitting program. Under CWA Section 404(g)(2), EPA must provide the Services with an opportunity to comment on a state or tribal

program submission. CWA Section 404(g)(2) provides that within ten days after receipt of a program assumption submission, EPA shall provide copies of the program application to the Corps and FWS. EPA extended that statutory direction to NMFS by regulation. 40 C.F.R. 233.15(d). CWA Section 404(h)(1) directs EPA to consider comments submitted by the Corps and FWS when determining whether a state or tribe has the requisite authority and meets the CWA statutory requirements with respect to implementing the CWA Section 404 program. EPA's regulations make clear that EPA should provide heightened attention to comments from the Services, providing that in issuing its approval or disapproval of a state or tribal program, EPA shall provide a responsiveness summary of significant comments received and its responses. EPA "shall respond individually to comments received from the Corps, FWS, and NMFS." 40 C.F.R. 233.15(g).

By requiring EPA to consider the Services' comments before deciding to approve an assumption request, and requiring states and tribes to comply with the CWA Section 404(b)(1) Guidelines when issuing permits under an assumed program, the CWA provides EPA with discretionary involvement and control that triggers the need for ESA Section 7 consultation when EPA's action may affect listed species. EPA has discretion regarding *the extent to which* it takes into account the Services' comments and can do so with an eye towards ensuring compliance with the CWA Section 404(b)(1) Guidelines. States and tribes are not required to consult on their individual permitting decisions, see 16 U.S.C. 1536(a)(2), so the program approval stage provides the most reasonable and efficient point in which to help ensure a process is in place to consider potential adverse impacts to species resulting from those permitting decisions. EPA has discretionary authority at that stage to shape program implementation to ensure compliance with the CWA Section 404(b)(1) Guidelines. This discretionary authority is unique to the transfer of CWA Section 404 permitting authority. There is no requirement in CWA Section 402 for EPA to take into consideration the views of the Services, and there is no corollary in the CWA Section 402 program to the CWA Section 404(b)(1) Guidelines. These provisions in CWA Section 404 provide discretion to EPA that is not present in the Section 402 context.

The legislative history of CWA Section 404 supports the argument for consultation. According to the Senate Report accompanying enactment of the assumption authority:

The committee amendments relating to the Fish and Wildlife Service are designed to (1) recognize the particular expertise of that agency and the relationship between its goals for fish and wildlife protection and the goals of the Water Act, and (2) encourage the exercise of its capabilities in the early stages of planning. By soliciting the views of the principal Federal agencies involved in the review of these programs at an early stage, objections can be resolved that might otherwise surface later and impede the operation of a State program approved by the Administrator. This consultation preserves the Administrator's discretion in addressing the concerns of these agencies, yet affords them reasonable and early participation which can both strengthen the State program and avoid delays in implementation. That is, early participation in the development and design of programs, guidelines, and regulations should serve to reduce the emphasis now placed on the review by the Fish and Wildlife Service of individual applications for permits under the Water Act.

S. Rep. 95-370, at 78 (1977). The report expresses a preference for early engagement with FWS at the program approval stage with the goal of reducing engagement at the individual permitting stage while preventing comments at the permitting stage that might lead to a permit objection.

While the legislative history does not specifically mention ESA Section 7 consultation, Congress used the phrase “consultation” at the developmental stage of state programs while recognizing EPA’s “discretion” in considering the FWS’s comments and ensuring efficient and effective program implementation following approval. Ensuring that federal decisions contemplate, where appropriate, potential impacts to listed species at a stage where those impacts can be most efficiently addressed is one of the hallmarks of the ESA Section 7 consultation process. The legislative history therefore supports programmatic consultation more so than suggesting that formal consultation is not required.

In *NAHB*, the Supreme Court held that ESA Section 7 consultation on an NPDES program transfer could impose conditions beyond those found in Section 402(b). 551 U.S. at 663-664. The Court stated that “[w]hile EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out Section 402(b)’s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list.” *Id.* at 671. In the CWA Section 404 context, however, an ESA consultation will not impose an entirely separate condition. Instead, ESA consultation will fulfill Congress’s statutory directive that the Services provide input on a state program prior to EPA’s approval. By allowing for consideration of the views of the Services through their comments and incorporation of the no jeopardy requirement from the CWA Section 404(b)(1) Guidelines, the statute provides authority for EPA to consult and consider protection of listed species in the approval decision.

In *NAHB*, the Supreme Court found that the canon against implied repeals supports the interpretation that the transfer of CWA Section 402 programs was a non-discretionary agency action. This reasoning is not applicable in the CWA Section 404 assumption context. The Court stated: “An agency cannot simultaneously obey the differing mandates set forth in Section 7(a)(2) of the ESA and the Section 402(b) of the CWA, and consequently the statutory language – read in light of the canon against implied repeals – does not itself provide clear guidance as to which command must give way.” 551 U.S. at 666. In the CWA Section 402 context, the Court found that approval of the state’s permitting authority was non-discretionary and “comports with the canon against implied repeals because it stays Section 7(a)(2)’s mandate where it would effectively override otherwise mandatory statutory duties.” *Id.* at 670. CWA Section 404 is distinguishable from CWA Section 402 because Congress required EPA to solicit comment from the FWS at the program approval stage and because the statute incorporates the jeopardy prohibition by reference to the CWA Section 404(b)(1) Guidelines. Here, ESA Section 7(a)(2)’s mandate does not override EPA’s statutory duties but instead fits into the existing statutory structure.

#### **IV. Implementation**

On August 20, 2020, EPA received a request from the State of Florida to assume administration of the CWA Section 404 program. For Florida and other states and tribes seeking to assume the CWA Section 404 program, EPA intends to engage in a one-time ESA Section 7 programmatic consultation with the Services in connection with the initial review of an assumption request if a

decision to approve a state or tribal CWA Section 404 program may affect ESA-listed species or designated critical habitat. To initiate consultation, the Agency will submit a biological evaluation to the Services, which evaluates the potential effects of EPA's potential approval of an assumption request on ESA-listed species, proposed species, designated critical habitat, and proposed critical habitat (50 C.F.R. 402.12). A biological evaluation also considers whether EPA's approval of an assumption request is likely to adversely affect any species or habitat.

For Florida and other states and tribes seeking to assume administration of the CWA Section 404 permitting program, EPA's engagement in a one-time ESA Section 7 programmatic consultation with the Services in connection with the initial review of an assumption application would allow one or both of the Services, as appropriate, to issue a programmatic biological opinion and programmatic incidental take statement for the state or tribal permitting program. The biological opinion and incidental take statement could establish additional procedural requirements and permitting conditions or measures that help ensure the state or tribal permitting program and individual permits issued pursuant to that program, as well as EPA's approval of that program, do not result in jeopardy to any listed species. This process, assuming compliance with any applicable permit conditions or measures, would extend ESA Section 9 liability protections to individual permits issued pursuant to the state or tribal program and place state and tribal CWA Section 404 permitting on equal footing with the Corps' permitting program. This streamlined permitting process would reduce costs and duplication of effort by state or tribal and federal authorities and facilitate more effective and efficient state and tribal CWA Section 404 programs. This programmatic consultation approach will ensure that listed species are protected while avoiding additional ESA Section 10 processes to obtain similar liability protections.

EPA disagrees with the comments stating that EPA's consultation regarding whether to approve or disapprove a request to assume the CWA Section 404 program does not alleviate existing ESA liability related to actions authorized by future state or tribal CWA Section 404 permits. The Services are required, as part of formal consultation, to prepare an incidental take statement if such take is reasonably certain to occur and will not violate ESA Section 7(a)(2). 50 C.F.R. 402.14(g)-(i). If, pursuant to the ESA regulations, the Services provide an incidental take statement, then "any taking which is subject to a statement as specified in [50 C.F.R. 402.14(i)(1)] and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the [ESA], and no other authorization or permit under the [ESA] is required." 50 C.F.R. 402.14(i)(5).

At the individual permit level, the CWA Section 404(b)(1) Guidelines prohibit discharges that will likely jeopardize the continued existence of endangered or threatened species, or result in the likely destruction or adverse modification of habitat designated as critical for these species as determined by the Services. See 40 C.F.R. 233.20; 40 C.F.R. 230.10(b)(3). EPA anticipates that states and tribes may develop different program structures and coordination mechanisms to meet these requirements and any conditions of a programmatic incidental take statement, depending on factors such as the structure and expertise of the state and tribal agencies, provisions of state and tribal law, previous coordination among state or tribal and federal agencies, the number of ESA-considered species and extent of critical habitat, and other factors. States and tribes maintain the existing flexibilities in developing their CWA Section 404 programs to meet these requirements.

EPA's determination that CWA Section 404 provides the requisite discretionary involvement or control for the ESA to apply to EPA's approval of a state or tribal CWA Section 404 program does not modify or alter the application of the ESA to other EPA actions not analyzed here, such as actions under the CWA (other than state assumption of CWA Section 404 programs), Safe Drinking Water Act, the



Resource Conservation and Recovery Act, or other statutes implemented by EPA. For example, there are significant differences in how the CWA Section 402 and 404 programs operate, legally and procedurally, and nothing in this memorandum modifies established precedent and procedures for the NPDES permitting program. Likewise, EPA's determination that EPA has the discretion to consult on CWA Section 404 program approvals does not apply to actions by other federal agencies. EPA and other federal agencies must evaluate each federal activity considering the relevant implementing statute and the relevant factual situations to determine if the ESA consultation requirement attaches.

**DAVID ROSS**

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ROSS  
Date: 2020.08.27 13:35:21  
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David P. Ross,  
Assistant Administrator

Date

## **Exhibit 2**



DEPARTMENT OF THE ARMY  
JACKSONVILLE DISTRICT CORPS OF ENGINEERS  
POST OFFICE BOX 4970  
JACKSONVILLE, FLORIDA 32232-0019

REPLY TO  
ATTENTION OF

March 19, 2018

Regulatory Division

## ***PUBLIC NOTICE***

### ***Determination of Navigable Waters***

TO WHOM IT MAY CONCERN: The Jacksonville District, U.S. Army Corps of Engineers (Corps), seeks input from the public regarding the use of waters within the State of Florida for navigation.

BACKGROUND: Pursuant to 33 C.F.R. § 329.4, navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) (Section 10) requires a Department of the Army (DA) permit for certain activities in, over, or under navigable waters of the United States. A determination whether a waterbody is a navigable water of the United States is made by the division engineer and is based on a report of findings prepared at the district level according to specific criteria (33 C.F.R. § 329.14(b)).

In an effort to provide clarity to the regulated public regarding which waters are subject to permitting authority under Section 10, the Corps is performing an analysis of waterways in the state of Florida to determine the extent of navigability and identify the limits of Section 10 jurisdiction.

These navigability studies are required by regulation to be conducted and updated whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the Division engineer for approval (33 C.F.R. § 329.15(a)). Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions (33 C.F.R. § 329.16(a)).

Section 404(a) of the Clean Water Act of 1972 (CWA), 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue DA permits for

the discharge of dredged or fill material into waters of the United States (Section 404 Program). Pursuant to Section 404(g) of the CWA, the Florida Department of Environmental Protection (DEP) is pursuing approval from the United States Environmental Protection Agency (EPA) to assume the Section 404 Program and administer its own individual and general permit program. State assumption of the Section 404 Program would be limited to certain waters and does not include navigable waters of the United States. The navigability studies will also assist with determining the waters that would be retained by the Corps if the EPA approves the State's application for Section 404 Program assumption. The Regulations governing the assumption process can be found at 40 C.F.R. §233.

**To assist with completion of the navigability studies, the Corps is seeking comments from the public regarding use of waters in the state of Florida for navigation. This includes identification of those rivers, streams, lakes, etc. associated with past, current, or potential future commerce, commercial traffic, or recreational activities.**

COMMENTS: Comments should be submitted in writing to the District Engineer or sent via email to the below addresses within 30 days from the date of this notice. Please include mapping, figures, coordinates, etc. that clearly identify the reach of the associated waterbody and documentation relating to navigation, commerce, and recreation.

DEPARTMENT OF THE ARMY  
JACKSONVILLE DISTRICT CORPS OF ENGINEERS  
REGULATORY DIVISION  
ATTN: DETERMINATION OF NAVIGABLE WATERS  
P. O. BOX 4970  
JACKSONVILLE, FLORIDA 32232-0019

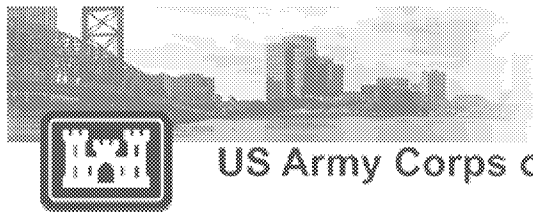
Navigability\_Determination@usace.army.mil



for

Donald W. Kinard  
Chief, Regulatory Division

## **Exhibit 3**



## JACKSONVILLE DISTRICT

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## Corps seeks public comment regarding water use for navigation

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Posted 4/5/2018

Release no. 18-022

**Contact**

Nakeir Nobles

The U.S. Army Corps of Engineers, Jacksonville District is seeking public comment regarding the use of waters within the State of Florida for navigation. The comment period closes April 18.

Section 10 of the Rivers and Harbors Act of 1899 requires a Department of the Army permit for certain activities in, over, or under navigable waters of the United States. Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

To provide clarity to the public regarding which waters are subject to permitting authority under Section 10, the Corps is performing an analysis of waterways in the State of Florida to determine the extent of navigability and identify the limits of Section 10 jurisdiction.

To assist with completion of the navigability studies, the Corps is seeking comments from the public regarding use of waters in the state of Florida for navigation. This includes identification of those rivers, streams, lakes, etc. associated with past, current, or potential future commerce, commercial traffic, or recreational activities.

Comments should be submitted in writing to the District Engineer or sent via email to the below addresses:

DEPARTMENT OF THE ARMY

JACKSONVILLE DISTRICT CORPS OF ENGINEERS

REGULATORY DIVISION

ATTN: DETERMINATION OF NAVIGABLE WATERS

P. O. BOX 4970

JACKSONVILLE, FLORIDA 32232-0019

Navigability\_Determination@usace.army.mil

The complete public notice can be found on the Jacksonville District's Regulatory Public Notice web page at:

<http://www.saj.usace.army.mil/Missions/Regulatory/Public-Notices/Article/1468769/navigability-determination/>

-30-

environmental Jacksonville District regulatory U.S. Army Corps of Engineers (USACE) waters of the United States

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# **Exhibit 4**



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
JACKSONVILLE DISTRICT CORPS OF ENGINEERS  
POST OFFICE BOX 4970  
JACKSONVILLE, FLORIDA 32232-0019

April 10, 2018

Regulatory Division

## ***UPDATED PUBLIC NOTICE***

### ***Cessation of Public Comment Period***

TO WHOM IT MAY CONCERN: The Jacksonville District, U.S. Army Corps of Engineers (Corps), is terminating the comment period for a previously issued public notice titled "Determination of Navigable Waters" and dated March 19, 2018. As of today, the comment period originally set to expire on April 20, 2018, is considered closed until further notice.

A handwritten signature in cursive script, reading "Jori K. White", is positioned above the typed name.

for

Donald W. Kinard  
Chief, Regulatory Division



# **Exhibit 5**



April 16, 2018

To: Jason A. Kirk, District Commander;  
 Copy: Donald W. Kinard, Chief, Regulatory Div.  
 Department of the Army  
 Jacksonville District Corps of Engineers  
 ATTN: Determination of Navigable Waters  
 P.O. Box 4970  
 Jacksonville, FL 32232-0019

**Re: Proposed Florida Department of Environmental Protection's assumption of delegation of Section 404 Dredge and Fill Permitting authority; Jacksonville District Corps of Engineers Public Notice dated March 19, 2018 seeking public comment regarding Determination of Navigable Waters; Jacksonville District Corps of Engineers Public Notice dated April 10, 2018 titled Cessation of Public Comment Period**

Dear Colonel Kirk:

Sierra Club Florida demands that the Corps completely rectify its inventory of Florida's navigable waters before any actions take place with regard to the assumption of delegation of Section 404 dredge and fill permitting authority by Florida's Department of Environmental Protection (FDEP). In the penultimate paragraph of the Public Notice dated March 19, 2018 (appendix A) the phrase "To assist with completion of the navigability studies," makes it clear that the Corps does not have a complete inventory of the navigable waters of the state. Sierra relied on the information in the public notice dated March 19, 2018 specifying the close of the public comment as April 18, 2018 as the deadline for submitting the requested information. In the Public Notice dated April 10, 2018 (Appendix B), the public comment period was peremptorily closed leaving us no clear official avenue to participate as requested in the original Public Notice. If the Corps had disclosed in advance that the time limit for submission of additional information was April 10, comments and additional information would have been filed by that date.

Discussion:

Allowing the FDEP assumption of delegation process to move forward in the absence of an accurate inventory of Florida's navigable waters threatens the destruction of even more of our state's posterity by potentially opening vast swaths of protected wetlands to be drained to make way for new development, including open pit mining. Proponents of such destructive large scale projects have considerable influence in state elections and policy, and their interests are not congruent with those of the state or nation, or the intent of the Clean Water Act. The Corps in

discharging its duty to the federal interest in protecting the nation's waters specified in Section 404 (g)(1) must retain its authority over *all* of those specified waters. In order to fulfill that responsibility, the Corps must know which waters fall into the (g)(1) category. Florida has lost over 9.3 million acres of its original wetland areas<sup>1</sup> to development and must not lose any more. Florida has managed without section 404 permitting authority for forty-six years; a delay of another six months or a year to acquire essential information will not cause lasting damage.

The Corps' lists of navigable waters are incomplete and inadequate. They total 492 Rivers and Creeks and 110 Lakes. The Supplement to those lists totals 1767 Rivers and Creeks and 1186 Lakes and the text prefacing the Supplement's lists includes this sentence, "The District makes no claim that these lists are complete or completely accurate." Thousands of acres of Florida's most important environmental lands could be effectively destroyed if the Government doesn't get the right list of what has to be protected. These lists were done in a rush and the Corps needs to go back and fix them.

Among the numerous resources listing Florida's water bodies are:

- the FDEP 2016 Integrated Water Quality Assessment for Florida, June 2016 (<https://floridadep.gov/sites/default/files/2016-Integrated-Report.pdf>) in Table 2.1. Florida atlas (p. 34) lists:
  - Total number of rivers and streams: More than 1,700 / 27,561 linear miles
  - Total number of ditch and canal miles: 47,708 linear miles
  - Number of lakes, reservoirs, and ponds: 7,748 (area greater than or equal to 10 acres)
  - Number of known springs: 1,089
- The USF Water Institute's Florida Atlas of Lakes lists 5466 lakes (<http://www.wateratlas.usf.edu/atlasoflakes/florida/>)
- The 1982 Gazetteer of Florida Lakes refers to 7318 lakes, 3191 named. 624 are over 100 acres; 1483 over 25 acres (<http://ufdc.ufl.edu/AA00001540/00001>)

These partial and uncertain lists require USACE to go back to the drawing board and contact the officials of each water management district, county, municipality, soil and water conservation district, and the like to find out from the people on the ground where navigable waters are. The Corps should also preserve the ability of waterways to provide a means of transportation for commerce by recognizing the historic use of small Florida streams for commerce during the navigation era of the 19<sup>th</sup> and early 20<sup>th</sup> century, when waterways were the only practical avenues of communication. See 'Short summary of the use of Florida waters for small scale commerce during the navigation era.' (Appendix C).

#### Determination of Navigability Public Notices from the Jacksonville District:

Despite the assertion in the Public Notice of March 19, 2018 that the Corps is performing an analysis of waterways in the state of Florida "in an effort to provide clarity to the regulated public," it is clear that the determination of navigability is a fundamental responsibility of the Corps, especially in light of FDEP's pursuit of assumption of delegation. Section 329 of the Code of Federal Regulations makes this clear:

<sup>1</sup> See report of the University of Florida Institute of Food and Agriculture Sciences Florida Wetlands Report (2015) available at <https://soils.ifas.ufl.edu/wetlandextension/threats.htm>

**§ 329.14 Determination of navigability.**

<https://www.law.cornell.edu/cfr/text/33/329.14>

**(a) *Effect on determinations.*** Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. **It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body.** Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law. *(emphases added)*

The language of 329.14 (a), “when jurisdictional questions arise”, applies. In this case the question is whether the USACE or FDEP will have authority over waters and wetlands that may or may not fall within Section 404 (g)(1). This is not a discretionary activity for the Corps, it is necessary. The Draft Memorandum of Agreement between FDEP and the Corps (Appendix D) contains the following paragraph:

III. WATERS TO BE ASSUMED A. All waters of the United States, as defined at 40 C.F.R. 232.2, within the State will be assumed by DEP as part of its State 404 Program, with the exception of those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto as described in Section III.B., below. **For purposes of this agreement, the Corps shall retain permitting authority over those Section 10, Rivers and Harbors Act of 1899 waters, which have been included, as of the effective date of this MOA, on the Jacksonville District Navigable Waters List for the State of Florida in Attachment A, except those waters included on the list based solely on their historical use.** This is consistent with the majority recommendations in the May 2017 Final Report of the Assumable Waters Subcommittee. *(emphases added)*

As of the date of this writing, the Jacksonville District Navigable Waters Lists ([http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other\\_permitting\\_factors/Jacksonville%20District%20Section%2010%20Waters.pdf](http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other_permitting_factors/Jacksonville%20District%20Section%2010%20Waters.pdf)) (Appendix E) lists 492 Rivers and Creeks and 110 Lakes. The third sentence of the text preceding the lists reads, **“However, complete lists of all rivers, creeks, ponds, and lakes subject to Corps section 10 authority are not available.”** The Supplement to those lists dated October 5, 2017 ([http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other\\_permitting\\_factors/20171005SupplementToJacksonvilleDistrictSection10Waters.pdf?ver=2017-10-05-123156-363](http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other_permitting_factors/20171005SupplementToJacksonvilleDistrictSection10Waters.pdf?ver=2017-10-05-123156-363)) (Appendix F) as noted above is prefaced by the caveat that “The District makes no claim that these lists are complete or completely accurate.” The process of delegating assumption of permitting authority to FDEP must not continue until complete lists are available. The MOA excerpted above in bolded text would, if adopted today, usurp USACE’s appropriate jurisdiction over (g)(1) waters simply because no complete list exists. The underlined text in the excerpt

takes as determinative the majority recommendations of the 2017 Final Report of the Assumable Waters Subcommittee (Appendix G) which is contrary to the USACE's Minority Recommendation.

**§ 329.15 Inquiries regarding determinations.**

<https://www.law.cornell.edu/cfr/text/33/329.15>

(c) Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or

(2) If not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

Since the MOA between FDEP and USACE will set the parameters of Corps and state jurisdictions, it is essential that a complete and accurate list of (g)(1) waters be available.

**§ 329.16 Use and maintenance of lists of determinations.**

<https://www.law.cornell.edu/cfr/text/33/329.16>

(a) Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the division engineer; changes are not considered final until a determination has been made by the division engineer.

Section 329.16 (a) requires the maintenance of tabulated lists of final determinations of navigability. That responsibility is not satisfied by the current lists of waters that have been determined to be navigable if the supplemental lists are included as they are, by the USACE's admission, possibly incomplete and/or inaccurate. At best, those lists are necessary but not sufficient as 329.16 (b) makes crystal clear. Finally, 329.16 (c) says "Deletions from the list are not authorized." The elimination of "waters included on the list based solely on their historical use" cited in the Draft MOA between USACE and FDEP would effectively remove these waters from the lists of waters that have been determined to be navigable without following the required procedures of subsection (c).

The Public Notice dated April 10, 2018 titled Cessation of Public Comment Period effectively denies Sierra and others of the opportunity to provide important information to USACE and weakens the ability of the Corps to fulfill its responsibility to determine the navigability of all the waters of the state that may come into question during the assumption of delegation process. The peremptory denial of an official conduit for comment on this important issue belies

recognition by USACE that the existing lists of Florida's navigable waters are inadequate and insufficient to meet regulatory and legal requirements. Additionally, the April 10 notice incorrectly identifies the public comment deadline as April 20 instead of April 18. Whether this is a typographical error or a cynical effort to convince members of the public who still wanted to submit their comments to do so after the actual deadline passed so it could be ignored is impossible to know.

Under these circumstances, the USACE must reopen the comment period, and comply with its rules and governing law by correcting the errors in its lists of navigable waters.

Thank you for your prompt attention to this matter.

Sincerely,

Frank Jackalone  
Florida Chapter Director  
Sierra Club  
1990 Central Avenue  
St. Petersburg, FL 33712  
727-824-8813, Extension 302

## **ATTACHMENTS (7)**

### **LIST OF APPENDICES**

Appendix A - Public Notice dated March 19, 2018

Appendix B - Public Notice dated April 10, 2018

Appendix C - Short summary of the use of Florida waters for small scale commerce during the navigation era

Appendix D - Draft Memorandum of Agreement between FDEP and the Corps

Appendix E - Jacksonville District Navigable Waters Lists

([http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other\\_permitting\\_factors/Jacksonville%20District%20Section%2010%20Waters.pdf](http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other_permitting_factors/Jacksonville%20District%20Section%2010%20Waters.pdf))

Appendix F – Supplement to Jacksonville District Navigable Waters Lists

([www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other\\_permitting\\_factors/20171005SupplementToJacksonvilleDistrictSection10Waters.pdf?ver=2017-10-05-123156-363](http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other_permitting_factors/20171005SupplementToJacksonvilleDistrictSection10Waters.pdf?ver=2017-10-05-123156-363))

Appendix G - 2017 Final Report of the Assumable Waters Subcommittee

# **Exhibit 6**



*Protecting Southwest Florida's unique natural environment and quality of life ... now and forever.*

April 18, 2018

*Sent via email*

Department of the Army  
Jacksonville District Corps of Engineers  
Regulatory Division  
Attn: Determination of Navigable Waters  
PO Box 4970  
Jacksonville, FL 32232-0019

The Conservancy of Southwest Florida is writing on behalf of our over 6,000 supporters, in regards to the navigability of waters in southwest Florida. The Conservancy strongly opposes the state of Florida assuming Clean Water Act Section 404 permitting authority.

This letter and its attachments should be considered as a response to the Army Corps of Engineers (ACOE) Public Notice dated March 19, 2018, entitled "Determination of Navigable Waters,"<sup>1</sup> along with additional forthcoming comments from the Conservancy and our partners. These comments should be used to provide clarity regarding which waters should be considered as subject to retained ACOE permitting authority under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403). Additional information-gathering by the ACOE and other stakeholders will be needed to ensure that these determinations are made utilizing a transparent process and complete best available scientific information.

We are very concerned with the original limited public commenting window that the ACOE issued, and even more concerned with the updated public notice dated April 10, 2018<sup>2</sup> that stated the public comment period was closed in advance of the original published deadline.

In preparation of these comments, the Conservancy has reviewed a document entitled "Jacksonville District Navigable Waters List" (a 6 page document that has been attached to the draft Memorandum of Agreement between the Florida Department of Environmental Protection and the Department of the Army that will be referred to in this letter as the "old list") and a document called "Supplement to the Jacksonville District Navigable Waters List" dated October 5, 2017 (a 17 page document that will be referred to in this letter as the "new list"), both enclosed.

ACOE should use the new 17-page list as their starting point with the inclusion of 139 waters that appear to be removed from the old 6-page list (see Attachment A). It is unclear why these waters dropped off the list, so again we ask that ACOE adopt the most expansive list of retained waters; including all waters that have previously been identified as navigable.

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<sup>1</sup> Army Corps of Engineers, 2018. Public Notice. Determination of Navigable Waters. March 19, 2018.

<sup>2</sup> Army Corps of Engineers, 2018. Updated Public Notice; Cessation of Public Comment Period. April 10, 2018.



Conservancy of Southwest Florida has been awarded Charity Navigator's prestigious 4-Star rating for good governance, sound fiscal management and commitment to accountability and transparency. Charity Navigator is America's largest and most respected independent evaluator of charities.

1495 Smith Preserve Way | Naples, Florida 34102 | 239.262.0304 | Fax 239.262.0672 | [www.conservancy.org](http://www.conservancy.org)



Further, the waters identified below :-while not an exhaustive list and not a complete description of past, current or potential future commerce, commercial, or recreational activity- may also meet the definition of navigable and should be considered for retention under ACOE purview under Section 10 of Rivers and Harbors<sup>3</sup>:

Charlotte County area

- Alligator Creek (on both lists): has recreational activity including paddling
- Bear Branch (on new list)
- Big Dead Creek (missing from both lists)
- Buck Creek (on both lists)
- Charlotte Harbor (missing from both lists): has recreational activity including paddling
- Charlie Creek (on new list): has recreational activity including paddling
- Coral Creek (on new list)
- Curry Creek (on new list)
- Deer Prairie Creek (on new list)
- Horse Creek (on new list)
- Howard Creek (on both lists)
- Jacks Branch (on new list)
- Joshua Creek (on new list)
- Lee Branch (on new list)
- Lewis Creek (missing from both lists)
- Little Alligator Creek (on new list)
- Myakka River (on both lists): has recreational activity including paddling
- North Fork Alligator Creek (on new list)
- Oyster Creek (on new list)
- Paynes Creek (missing from both lists)
- Peace River (on both lists): has commercial and recreational activity including sightseeing operators and paddling
- Rock Creek (on new list)<sup>4</sup>
- Sam Knight Creek (on new list)
- Shell Creek (on both lists): has recreational activity including paddling
- South Fork Alligator Creek<sup>5</sup> (missing from both lists)
- West Branch Coral Creek (on new list)
- Whidden Creek (on new list)

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<sup>3</sup> Decades of administrative action and case law relating to the CWA and RHA have established that use in "interstate or foreign commerce" can also include use for recreational commerce activities such as fishing, swimming and boating. See, e.g., *State of Utah By & Through Div. of Parks & Recreation v. Marsh*, 740 F.2d 799, 803-04 (10th Cir. 1984) (interstate commerce included recreational use of lake by interstate travelers for fishing, hunting, boating, camping, wildlife viewing and other activities).

<sup>4</sup> There is a Rock Creek in Charlotte County area, as well as in the Collier County area. It is unclear which Rock Creek is listed on the new Supplemental list.

<sup>5</sup> The new Supplemental list includes a "South Prong Alligator Creek."

Collier County area

- Barron River (on both lists): has recreational activity including paddling and boating
- Barron Canal (missing from both lists)
- Blackwater River (on both lists): has recreational activity including paddling
- Camp Keais Strand (missing from both lists)
- City of Marco area canals
- Clam Bay/Pass (missing from both lists): has recreational activity including paddling
- Cocohatchee River (on both lists): has recreational activity including paddling
- Cocohatchee Canal (missing from both lists): has recreational activity including boating
- Cow Slough (missing from both lists)
- East River (on both lists)
- Fakahatchee Bay (missing from both lists)
- Fakahatchee River (on both lists)
- Fakahatchee Strand (missing from both lists): has recreational activity including paddling
- Faka Union River (on new list)
- Faka Union Bay (missing from both lists)
- Faka Union Canal (missing from both lists): has recreational activity including paddling and boating
- Ferguson River (on new list)
- Haldeman Creek (missing from both lists): has recreational activity including paddling and boating
- Golden Gate Canal (missing from both lists): has recreational activity including Conservancy of Southwest Florida boat tour and kayaking
- Gordon River (on new list): has recreational activity including Conservancy of Southwest Florida boat tour and kayaking
- Henderson Creek (on both lists): has recreational activity including paddling and boating
- Lake Trafford (missing from both lists): has commercial and recreational activity including fishing,airboat operators, sightseeing operators, and marina
- Little Hickory Bay (missing from both lists)
- Naples Bay (missing from both lists)
- New River (on both lists)
- Okaloacoochee Slough (missing from both lists)
- Pumpkin Bay (missing from both lists) - paddling
- Silver Strand (missing from both lists)
- Rock Creek (on new list): has recreational activity including boating
- Rookery Bay (missing from both lists): has recreational activity including paddling
- Turner River (on both lists): has commercial and recreational activity including sightseeing operators and paddling
- Water Turkey Bay (missing from both lists)
- Whitney River (on both lists)
- Wiggins Pass (missing from both lists): has recreational activity including paddling

Lee, Hendry, and Glades County areas

- Bedman Creek (on new list): has recreational activity including paddling
- Bee Branch (on new list)
- Billy Creek (on both lists): has recreational activity including paddling

- Caloosa Creek (missing from both lists): has recreational activity including paddling
- Caloosahatchee River (on both lists): has recreational activity including paddling
- Caloosahatchee Canal (on new list)
- Catfish Creek (on new list)
- City of Cape Coral canals (missing from both lists): has recreational activity including paddling, fishing, and boating
- Cypress Branch (on new list)
- Cypress Creek (on both lists): has recreational activity including paddling
- Daugherty Creek (missing from both lists): has recreational activity including paddling
- Deadmans Branch (on new list)
- Deep Lagoon Canal (missing from both lists): has recreational activity including paddling
- Estero River (on both lists): has commercial and recreational activity including paddling
- Estero Bay (missing from both lists): has recreational activity including paddling and boating
- Fisheating Creek (on both lists): has commercial and recreational activity including sightseeing operators and paddling
- Fitcher's Creek (missing from both lists): has recreational activity including paddling
- Fort Simmons Branch (on new list)
- Four Mile Cove<sup>6</sup> (missing from both lists): has recreational activity including paddling
- Gasparilla Sound (missing from both lists): has commercial and recreational activity including, paddling, boating, sightseeing operators
- Gator Slough (on the new list) : has recreational activity including paddling
- Goodno Canal (missing from both lists)
- Hancock Creek (on new list): has recreational activity including paddling
- Hendry Creek (on new list)
- Hickey Creek (on new list): has recreational activity including paddling
- Imperial River (on both lists): has commercial and recreational activity including paddling and sightseeing operators
- Jewfish Creek (on new list): has recreational activity including paddling
- Jug Creek (missing from both lists): has recreational activity including paddling, fishing, boating
- Lake Hicpochee (missing from both lists): has recreational activity including paddling
- Lake Okeechobee (missing from new list): has commercial and recreational activity including paddling, marina, resort
- Lake Okeechobee Rim Canal (missing from new list)
- Lake Okeechobee Waterway (missing from new list): has commercial and recreational activity including boating
- Long Hammock Creek (missing from both lists)
- Manuel Branch (on new list): has recreational activity including paddling
- Marsh Point Creek (missing from both lists): has recreational activity including paddling
- Matlacha Pass (missing from both lists): has commercial and recreational activity including paddling, boating, and shellfish harvesting
- Mullock Creek (on new list): has recreational activity including paddling
- Nine Mile Canal (missing from both lists)
- Oak Creek (on new list): has recreational activity including paddling
- Orange River (on both lists): has commercial and recreational activity including paddling

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<sup>6</sup> The new Supplemental list includes a "Four Mile Branch" and "Four Mile Creek."

- Otter Creek (on new list): has recreational activity including paddling
- Owl Creek (on new list): has recreational activity including paddling
- Palm Creek (missing from both lists)
- Pine Island Creek (on new list)
- Pine Island Sound (missing from both lists): has commercial and recreational activity including paddling and boating
- Pollywog Creek (on new list)
- Popash Creek (on new list): has recreational activity including paddling
- Powell Creek (on new list)
- Roberts Canal (missing from both lists)
- San Carlos Bay (missing from both lists): has recreational activity including paddling and boating
- Sanibel River (missing from both lists): has recreational activity including paddling
- Shell Creek<sup>7</sup> (on both lists): has recreational activity including paddling
- Six Mile Cypress Slough (missing from both lists)
- Spanish Creek (on new list): has recreational activity including paddling
- Spring Creek (on both lists): has recreational activity including paddling
- St. James Creek (missing from both lists): has recreational activity including paddling
- Stroud Creek (on new list): has recreational activity including paddling
- Telegraph Creek (on new list): has recreational activity including paddling
- Ten Mile Canal (missing from both lists): has recreational activity including paddling
- Townsend Canal (missing from both lists)
- Trout Creek (on both lists): has recreational activity including paddling
- Whiskey Creek (on new list): has recreational activity including paddling
- Yellow Fever Creek (on new list): has recreational activity including paddling
- Yucca Pen Creek

If you have any questions about our letter, please contact me at (239) 262-0304, ext. 286. Thank you for considering our comments.

Sincerely,



Amber Crooks  
Environmental Policy Manager

ENCLOSURES: Navigable Waters List (6 pages)

Supplement to the Jacksonville District Navigable Waters List dated October 5, 2017  
(17 pages)

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<sup>7</sup> There is a Shell Creek in Charlotte County area, as well as in the Lee County area. It is unclear which Shell Creek is listed.

Attachment A

Waters that were on the 6-page document but not included in the 17-page update (2017):

Rivers and Creeks

1. Alligator Lake-Lake Gentry
2. Barrentine Creek
3. Big Marco River
4. Big Mud Creek
5. Black Creek (Walton County)
6. Blue Hole Creek
7. Blue Springs Run
8. Bonnet Creek
9. Boynton Canal
10. Brick-Alligator Lake Canal
11. Broward Creek
- ~~12~~ C-15 Canal
- ~~13~~ C-17 Canal
14. C-18 Canal
- ~~15~~ C-23 Canal
- ~~16~~ C-24 Canal
17. C-51 Canal
- ~~18~~ Chicopit Bay
- ~~19~~ Coldwater Creek
- ~~20~~ Coon Lake-Lake Lizzie Canal
21. Coral Gables Waterway
- ~~22~~ Cormorant Creek
- ~~23~~ Cowhead Creek
- ~~24~~ Dania Cut-Off Canal
- ~~25~~ Deblieu Canal
- ~~26~~ Doctors Lake
- ~~27~~ Gulley Creek
- ~~28~~ Haines Creek
- ~~29~~ Hatchett Creek
- ~~30~~ Hatchineha Canal
- ~~31~~ Hillsboro Canal
- ~~32~~ Hillsboro River
- ~~33~~ Hitchens Creek
- ~~34~~ Holiday Harbor
- ~~35~~ Hudson Bayou

- 36 Indian River North
- 37 Jackson Canal
- 38 Johnson Creek (Gulf County)
- 39 Jones Swamp Creek
- 40 Kentner Creek
- 41 L-40 Canal
- 42 L-8 Canal
- 43 Lafayette Creek
- 44 Lake Ajay-Fells Cove Canal
- 45 Lake Apopka-Beauclerc Canal
- 46 Lake Ashby Canal
- 47 Lake Center-Coon Canal
- 48 Lake Griffin-Lake Canal
- 49 Lake Hart-Ajay Canal
- 50 Lake Joel-Myrtle Canal
- 51 Lake Joel-Trout Canal
- 52 Lake Lizzie-Alligator Canal
- 53 Lake Mary Jane-Hart Canal
- 54 Lake Myrtle-Mary Jane Canal
- 55 Lake Okeechobee Rim Canal
- 56 Lake Okeechobee Waterway
- 57 Lake Preston-Myrtle Canal
- 58 Lake Worth Lagoon
- 59 Lehigh Central
- 60 Little Clapboard Creek
- 61 Little Double Creek
- 62 Little Mud Creek
- 63 Lopez River
- 64 Moore's Creek (Martin County)
- 65 Morris Dead River
- 66 Morrison Creek
- 67 Murphy Creek
- 68 Myakkahatchee Creek
- 69 NN Creek
- 70 North New River Canal
- 71 Old Channel
- 72 Pea River
- 73 Phelps Creek
- 74 Poncho Creek
- 75 Rocky Creek
- 76 Salt Creek

- 77. Short Canal
- ~~78~~ Snell Creek
- ~~79~~ South Port Canal
- ~~80~~ Stranahan River
- 81. Summer Haven River
- ~~82~~ Tarpon River
- ~~83~~ Trout-Coon Lake Canal
- ~~84~~ Turkey Creek
- ~~85~~ Warf Creek
- ~~86~~ West Branch\*<sup>8</sup>
- ~~87~~ West Palm Beach' Canal
- 88. Woodruff Creek
- 89. Wrights Creek (Walton County)

- 1. Blue Cypress Lake
- 2. Blue Lagoon
- 3. Brick Lake
- 4. Cherry Lake
- 5. Coon Lake
- 6. Dumbfoundling Bay
- 7. Fells Cove
- 8. Lake Ajay
- 9. Lake Apopka
- 10. Lake Ashby
- 11. Lake Beauciair
- 12. Lake Carlton
- 13. Lake Center
- ~~14~~ Lake Dora
- ~~15~~ Lake Gentry
- ~~16~~ Lake Hatchineha
- ~~17~~ Lake Hell 'n Blazes
- ~~18~~ Lake Isokpoga
- ~~19~~ Lake Jackson
- ~~20~~ Lake Jessup
- ~~21~~ Lake Joel
- ~~22~~ Lake Kissimmee

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<sup>8</sup> West Branch Blockhouse Creek, Coral Creek, Lightwood Knot Creek, Mare Creek, & South Prong Alafia River included in the update.

- ~~23~~ Lake Lizzie
- ~~24~~ Lake Manatee
- ~~25~~ Lake Mary Jane
- ~~26~~ Lake Minnehaha
- ~~27~~ Lake Minneola
- ~~28~~ Lake Nellie
- ~~29~~ Lake Okeechobee
- ~~30~~ Lake Ola
- ~~31~~ Lake Powel
- ~~32~~ Lake Preston
33. Lake Rosalie
34. Lake Santa Fe
35. Lake Talquin
36. Lake Tarpon
37. Lake Thonotosassa
38. Lake Tohopekaliga
39. Lake Washington
40. Lake Weohyakapka
41. Lake Winder
42. Lake Yale
43. Little Lake Harris
44. Little Lake Santa Fe
45. Lochloosa Lake
46. Loughman Lake
47. Rodman Reservoir
48. Spring Garden Lake
49. Tsala Apopka Lake
50. Ward Lake (Manatee County)



## **Exhibit 7**



April 17, 2018

Mr. Donald W. Kinard  
Chief, Regulatory Division  
Jacksonville District Corps of Engineers  
P. O. Box 4970  
Jacksonville, FL 32232-0019

RE: Comments regarding the Determination of Navigable Waters in Florida

Dear Mr. Kinard,

As the State of Florida moves toward assumption of the Section 404 Program of the Clean Water Act (CWA), a determination must be made regarding which waters are to remain within federal jurisdiction. Audubon Florida appreciates the importance of this effort and thanks the Corps for soliciting input from the public. We also support and anticipate a public process leading to the creation of the related Memoranda of Agreement between the state and federal agencies.

We offer the following comments on the creation of the navigable waters list. In general, Audubon supports the positions put forth by the Corps in the Final Report of the Assumable Waters Subcommittee in 2017 and believes this reasoning should be the basis for the current effort. Listed below are the steps we feel the Corps should take to create the list of the waters and wetlands to remain within their administrative authority.

**1. Begin with the waters listed on the "Supplement to the Jacksonville District Navigable Waters Lists" dated October 5, 2017.**

The October 5, 2017 list should represent the baseline from which to build the complete list of retained waters. This list should be augmented with additions based on the suggestions that follow.

**2. Add waters on Indian lands that are assumable by tribes under the CWA section 404.**

Since tribes could request assumption of waters on their lands at a future date they should remain under the authority of the Corps.

**3. The Corps should retain wetlands adjacent to navigable waters according to the guidance and process that has been in place for many years.**

Wetlands considered adjacent to a navigable water are those that contribute to its continued navigability. Changes in the conditions of these wetlands will have direct impacts on navigable waters and should be included in the list of retained waters under authority of the Corps. Given Florida's unique, highly transmissive karst geology, the identification of adjacent waters should go beyond a simple examination of distance from a navigable water and should consider groundwater flow.

**4. The Corps should add waters and wetlands that are connected to recreation and tourism, Florida's primary industry and chief source of interstate and international commerce.**

The EPA defines "Waters of the U.S." in part by their use for interstate and international commerce, including recreation and travel tourism (emphasis added):

*40 CFR 230.3(s) The term waters of the United States means:*

- 1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;*
- 2. All interstate waters including interstate wetlands;*
- 3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:*
  - a. **Which are or could be used by interstate or foreign travelers for recreational or other purposes; or***
  - b. **From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or***
  - c. **Which are used or could be used for industrial purposes by industries in interstate commerce;***

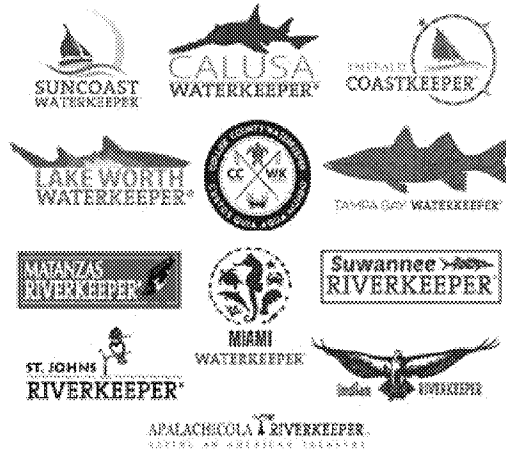
Accordingly, the Corps' Section 10 criteria must ensure that navigable waters and their adjacent wetlands which support tourism and recreational use are not assumable by the state. These uses, especially throughout Florida, clearly involve interstate and international commerce.

Thank you for considering our comments. Florida's assumption of Section 404 permitting will be very complex and will require careful development to ensure state implementation will be no less protective than existing federal standards. A public process to develop this assumed program will be essential. Please keep Audubon Florida apprised of continued work on this issue as it of great importance to our organization and our members throughout the state.

Sincerely,

Julie Wraithmell  
Interim Executive Director

# Exhibit 8



Colonel Jason A. Kirk, District Commander  
 Jacksonville District Corps of Engineers  
 Regulatory Division  
 Att'n: Determination of Navigable Waters  
 P.O. Box 4970  
 Jacksonville, Florida 32232-0019

April 18, 2018

Via Email [Jason.a.kirk@usace.army.mil](mailto:Jason.a.kirk@usace.army.mil), [Navigability\\_Determination@usace.army.mil](mailto:Navigability_Determination@usace.army.mil)

Dear Colonel Kirk:

On behalf of our respective organizations, we are writing to request that the U.S. Army Corps of Engineers adopt the broadest interpretation of navigable waters under the Clean Water Act (CWA). Florida's waterways are uniquely connected and thus should be comprehensively and collectively protected under the Clean Water Act. We oppose any attempt to undermine these protections through unnecessary reclassification of waterways and we sincerely urge the Corps to maintain permitting authority over these important resources.

CWA Section 404 requires permits for the discharge of dredge and fill material into Waters of the United States, including wetlands. Florida has particularly fragile and critical areas that are regulated by Section 404 dredge and fill permits, and which require the highest level of review and scrutiny. We believe that the federal government is best able to conduct this review given their historic jurisdiction and agency expertise in this area. The federal authority to govern our waters has its origins in the Commerce Clause of the Constitution due to the central role our waterways and seas play in interstate commerce. Traditionally, wetlands have been subject to federal jurisdiction as well due to their critical role in providing watershed connectivity. As such, we strongly believe that CWA authority should remain with the federal government and any delegation to the state would be inappropriate and incongruous with the spirit of the law. Our organizations vehemently oppose the state of Florida's attempt to assume this jurisdiction.

Due to the value of these resources to our state, we urge the Corps to apply a broad interpretation to navigable waters in order to maintain federal control of these waterways. We request the Corps fully assess Florida's water bodies to ensure the Florida Navigable Waters List is complete and completely accurate. In addition, we urge the Corps to provide adequate public involvement and transparency during the process to update Florida's Navigable Waters.

In addition, we fully support comments submitted by Earthjustice regarding the navigability of waters in the State of Florida within the meaning of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, for purposes of determining the Corps' jurisdiction should the U.S. Environmental Protection Agency (EPA) grant Florida's anticipated request to administer its own permitting program under Section 404(a) of the Clean Water Act of 1972 (CWA), 33 U.S.C. § 1344, in waters of the United States.

Each signatory is an independent organization and member of Waterkeeper Alliance, a global movement of on-the-water advocates who patrol and protect over 100,000 miles of rivers, streams and coastlines in North and South America, Europe, Australia, Asia and Africa. More than 300 Waterkeeper Organizations worldwide combine firsthand knowledge of their waterways with an unwavering commitment to the rights of their communities and to the rule of law.

Sincerely,  
Rachel Silverstein  
Miami Waterkeeper

Lisa Rinaman  
St. Johns Riverkeeper

Georgia Ackerman  
Apalachicola Riverkeeper

Andrew Hayslip  
Tampa Bay Waterkeeper

Marty Baum  
Indian Riverkeeper

Andy Mele & Justin Bloom  
Suncoast Waterkeeper

Jen Lomberg  
Matanzas Riverkeeper

John Quarterman  
Suwannee Riverkeeper

Rick Frey  
St. Marys Riverkeeper

Reinaldo Diaz  
Lake Worth Waterkeeper

Harrison Langley  
Collier County Waterkeeper

Laurie Murphy  
Emerald Coastkeeper

John Cassani  
Calusa Waterkeeper

## **Exhibit 9**

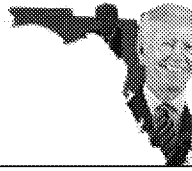




# **Exhibit 10**

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## Florida agencies asked to cut 8.5 percent to adjust for COVID-19

The directive came after the pandemic caused tax revenues to plummet in April, May and June and after DeSantis vetoed \$1 billion in spending from the 2020-2021 budget.



The Florida Legislature is facing steep budget cuts for the state budget, but has so far refused to hold a special session.

By **Christine Sexton**

TALLAHASSEE — Getting ready for the possibility of a special legislative session to balance Florida's budget, Gov. Ron DeSantis' administration and top House and Senate appropriations staff have called on state agencies to draw up ways to slice 8.5 percent from their current budgets to address "the expected shortfall" as a result of the COVID-19 pandemic.

The direction to look for reductions does not mean such cuts will be made in the fiscal year 2020-2021 budget, which took effect July 1. It was included in annual budget instructions sent to state agencies in mid-July.

But it came after the pandemic caused tax revenues to plummet in April, May and June and after DeSantis vetoed \$1 billion in spending from the 2020-2021 budget. DeSantis made the vetoes in hopes of conserving cash and aligning the budget, which lawmakers passed in March as the pandemic was starting to hit, with the economic realities stemming from business shutdowns and job losses.

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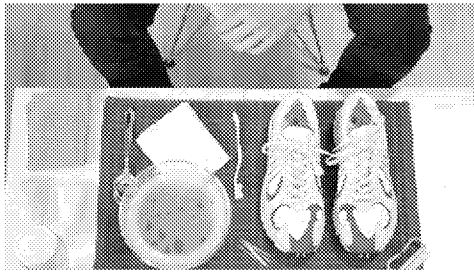


Despite frequent requests from Democrats, DeSantis and Republican legislative leaders have shown no willingness to hold a special session before the November elections. But with the fiscal year running through June 30, they could be faced with making budget cuts at some point.

While DeSantis vetoed \$1 billion, he signed a \$92.2 billion budget into law that included high-profile issues such as \$500 million to increase teacher pay, \$625

for state workers.

When he signed the budget in June, DeSantis said he was convinced “we’ll be able to weather the storm and do it right,” noting that the state had bolstered its reserves and had received money through a federal-stimulus law known as the CARES Act.



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But DeSantis said on a radio show Monday that the pandemic will “loom” over every budget and policy debate during the 2021 legislative session, which starts in March.

“We are using intelligently the CARES Act money in a way that I think will keep us whole,” DeSantis said during an appearance on the Preston Scott show on WFLA radio in Tallahassee. “So, as we go into the legislative session, from a budget perspective, I think we’ll probably be OK for this fiscal year. I think the question is, is how robust is the recovery from the coronavirus shutdown? And if it’s robust, that gives us more options. If it’s not, then we may have to make some more tough decisions.”

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A panel of economists will meet Friday to revise estimates of state general revenue, which plays a critical role in funding schools, health programs and prisons.

But economists recently said the state finished the 2019-2020 fiscal year on June 30 with \$1.88 billion less in revenues than what was previously anticipated.

The declining revenues also come at a time when more Floridians have enrolled in Medicaid. Enrollment in the health-care program for poor, elderly and disabled people is expected to balloon by more than 14 percent during the current fiscal year, with economists predicting an average monthly enrollment of 4.36 million people.

DeSantis' office did not immediately respond to requests for comments about the memo directing agencies to look at possible budget cuts. But Senate spokeswoman Katie Betta called the reduction exercise prudent.

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“It is common for (a legislative budget request) instructions to include an exercise evaluating current year cuts during times when there are significant unknown and unpredictable factors impacting the state budget,” Betta said.

Betta added that another “data point will be available later in the week” when the panel of economists update the general revenue estimates.

The July 15 budget memo also requires state agencies to compile recommendations on 10 percent worth of reductions for the 2021-2022 fiscal year, which will start July 1.

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The 10 percent reduction is part of a routine budget exercise. The governor’s office and legislative budget officials made “optional” a portion of that exercise that allows agencies to make a priority listing of the programs or services targeted for potential reductions.

**UP NEXT:** [Amendment 3 would suppress Black representation in Florida, new report says](#)

# **Exhibit 11**

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## OPINION

## Editorial: The Rick Scott record: an environmental disaster



Diver Josh Lunsford uses a vacuum pump to pull out nitrate-rich sediment from Chassahowitzka Springs as a part of a springs restoration project. Gov. Rick Scott ended a springs restoration initiative launched by Gov. Jeb Bush, and did nothing to push a bipartisan bill in the Senate that would have spent hundreds of millions of dollars to clean up springs.

Published Sep. 5, 2014

For the last 50 years, Florida's governors have been reasonably responsible stewards of the state's fragile environment. They initiated efforts to clean up rivers and bays, buy and preserve millions of acres of sensitive land, manage



## ≡ Tampa Bay Times

cleaner and more land is protected from development than a generation or two ago. In just four years, Gov. Rick Scott has put those accomplishments at risk.

Scott has bulldozed a record of environmental protection that his Republican and Democratic predecessors spent decades building. He weakened the enforcement of environmental laws and cut support for clean water, conservation and other programs. He simultaneously made it easier for the biggest polluters and private industries to degrade the state's natural resources. While the first-term Republican attempts to transform himself into an environmentalist during his re-election campaign, his record reflects a callous disregard for the state's natural resources and no understanding of how deeply Floridians care about their state's beauty and treasures.

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Scott changed the direction of environmental policy from the start, appointing a Jacksonville shipping executive with "insights on the challenges businesses face in the permitting process" as the secretary of the Department of Environmental Protection. He asked the Legislature for smaller budgets for DEP every year except for this election year. But the governor's stinginess is only part of the problem. He also triggered a brain drain among regulators, sided with polluters and developers over public health, refused to acknowledge the impact of man-made climate change and stalled any serious attempt to address water quality, land conservation or growth management.

### Enforcement

In his first year, Scott forced the state's five regional water management districts to reduce their budgets by \$700 million and filled their appointed boards with

## ≡ Tampa Bay Times

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and led to widespread layoffs at the water management districts that turned them into shells of their former selves. The Scott administration undercut enforcement and dampened public input on development as it eliminated the state's growth management agency. DEP offered bonuses to employees to speed up permitting, and its departing regulatory chief boasted this year that the agency cut wait times for permits by two-thirds.

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Scott's political appointees created a chilling culture at the DEP. The former deputy secretary ordered the agency's top wetlands expert to approve a permit that she said would violate state law. After Connie Bersok refused, she was suspended and investigated by the agency. She was later vindicated, and the project was dropped.

### Water

In what was a priority for big polluters, Scott waged a protracted fight with the federal government over long-delayed clean water standards. The Environmental Protection Agency eventually caved to the pressure and gave the state too much discretion, a transparent attempt by the Obama administration to boost the president's popularity in Florida during his re-election campaign. In 2012, Scott killed a statewide septic tank inspection program that would have been key to reducing water pollution. He ended a springs restoration initiative launched by Gov. Jeb Bush. This year, he did nothing to push a bipartisan bill in the Senate that would have spent hundreds of millions of dollars cleaning up the springs. He did ask for \$55 million in his budget for springs, but instead the Legislature agreed to only \$30 million.

### Conservation

The economic meltdown caused spending for the Florida Forever land conservation program to drop by nearly two-thirds by the time Scott took office from its high-water mark years ago. But spending in Scott's first three years dropped significantly, from \$100 million the year he came into office, to \$27 million in 2012 and \$17 million in 2013. Most of the money committed in the last two years has not been cash but permission to use money from the sale of surplus

administration scrapped the effort without selling a single acre.

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Now Scott wants to pave over his record with a campaign plan that calls for more than \$1 billion in spending over the next decade. He would commit \$500 million each for springs restoration and alternative water supply projects. His proposal far exceeds what he budgeted for springs and conservation land during his first term, and he offers no suggestions for how to raise the money. The governor also calls for tougher legislation to punish polluters, which would be another major shift in direction.

It is difficult to imagine Scott increasing environmental enforcement when the number of such cases dropped by nearly two-thirds after his first year. Or pursuing a more robust effort to buy endangered land when the land-buying office has been decimated. Or following through on ambitious promises to emphasize restoration of the Everglades after he signed legislation that caps the sugar industry's financial liability for the cleanup. Scott also made it easier for private companies to tap the state's supply of reclaimed water even as he made it much harder for the public to challenge water and mining permit applications. He even signed legislation that fast-tracked the permitting process for gas pipelines and restricted how many times local officials may ask developers questions about their permit applications.

The governor won't even say whether he supports the land and water conservation measure, Amendment 1, that will appear on the November ballot. If that measure passes, the state would lock in funding for conservation by dedicating revenue from the tax on property sales. Advocates say the amendment, which could raise \$19 billion over 20 years, is needed to protect environmental funding from the annual whims of state lawmakers. It's also needed to protect Florida from governors like the incumbent, who has no sense of Florida and its values.

Scott wants voters to believe he has turned green. His record shows he has been the least environmentally sensitive governor in the last half-century, and there is no reason to expect there would be a sudden transformation in a second term.

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**UP NEXT:** [Column: When more of a good thing is bad](#)

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